IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

HUCKLEBERRY TRUST, Appellant, v. THE CITY OF MEDINA, a Washington municipal corporation; FRED and JANE DOE BURNSTEAD, husband and wife, Respondents.	)	No. 55937-1-I UNPUBLISHED OPINION FILED: July 24, 2006

ELLINGTON, J. The only question here is whether a 128-square-foot playhouse is subject to the Medina zoning code. The zoning regulations are constitutionally valid and were properly applied to the structure, and we affirm the city's order requiring that the playhouse be moved.

BACKGROUND

Bruce McCaw and his family live in Medina on property owned by the Huckleberry Trust. The 80,000 square foot parcel occupies the southeastern tip of the Medina peninsula. Respondents Fred and Jane Doe Burnstead own the adjacent property to the north.

In the spring of 2003, the McCaws purchased an eight-by-sixteen-foot

prefabricated playhouse as a gift for their daughter on her fifth birthday. The playhouse was lifted by crane to a spot at the northern edge of the property bordering the Burnsteads' patio, where a sandbox and play area has been located since before the trust bought the property.

The Burnsteads complained to the City of Medina. The city notified the trust that the playhouse required a building permit and violated side yard setback requirements, and ordered the trust to comply with the Medina Municipal Code or remove the playhouse. A formal notice of violation was issued in September of 2003 listing building permit and setback violations and a third violation for exceeding the structural coverage limit for the property.

McCaw and the trust applied for a building permit and sought variances from the setback and structural coverage regulations. A hearing examiner denied the variances, and because the variances were necessary for a building permit, found that issue moot. The trust appealed under the Land Use Petition Act, chapter 36.70C RCW. The superior court affirmed, and this appeal followed.

ANALYSIS

Under the Land Use Petition Act, we review the administrative record directly. Thornton Creek Legal Defense Fund v. City of Seattle, 113 Wn. App. 34, 47, 52 P.3d 522 (2002). A land use decision will be reversed if the party seeking relief shows that:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
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> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
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> (d) The land use decision is a clearly erroneous application of the law to the facts;
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> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

We review questions of statutory construction de novo. Lakeside Indus. v. Thurston County, 119 Wn. App.886, 894, 83 P.3d 433, review denied, 152 Wn.2d 1015 (2004). Though we are not bound by administrative interpretation of a statute or ordinance, "[c]onsiderable judicial deference is given to the construction of legislation by those charged with its enforcement." Keller v. Bellingham, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979); City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). The decisions here required application of the law to the facts, and are reviewed for clear error under RCW 36.70C.130(1)(d). "A decision is clearly erroneous when, after reviewing the record as a whole, [the court] is left with the definite and firm conviction that a mistake has been made." Thornton Creek, 113 Wn. App. at 58.

The trust contends first that the playhouse is not subject to the city's zoning regulations. It then argues in the alternative that even if the regulations apply, either the playhouse is allowed as a legal nonconforming structure or the hearing examiner erred in denying the necessary variances. Finally, the trust contends the regulations as applied here violated its due process rights. We consider each argument in turn.

Applicability of Zoning Code

Structural Coverage. It is undisputed that the total lot coverage of existing structures, including the playhouse, is 27.5 percent of the property area,[1] which exceeds the 13 percent allowed by the code. MMC 17.24.010(C). The trust contends the playhouse is not subject to the coverage limitation and/or is exempt, either because it is temporary, or because it is a "garden type" structure with no foundation. We disagree.

The Medina Municipal Code defines structural coverage as "the total surface area of a site covered by buildings, structures, patios, and sports courts." MMC 17.12.010(B). A structure is "that which is erected, built or constructed, including an edifice or building of any kind or any piece of work artificially built up or composed of parts joined together in some definite manner." Id. A building is "any structure having a roof supported by columns or walls for the housing or enclosure of persons, animals or property." Id.

The playhouse is constructed of "parts joined together in some definite manner," has a roof supported by walls, and "encloses" the children and their toys. The playhouse is both a "building" and a "structure."

The Medina Municipal Code provides for seven exceptions to the structural coverage limitation: areas covered by a pervious surface; driveways; uncovered sports courts, patios, and in-ground pools less than 30 inches above original grade; most

[1] The house and garage cover 12 percent of the property. After the trust bought the property, the city amended its regulations, redefining structural coverage (bringing the trust's structural coverage to 27.5 percent because of the pool, terrace, and tennis court) and reducing the allowed total coverage (from 17.5 percent to 13 percent). The playhouse adds 0.14 percent new structural coverage, bringing the total to 27.64 percent.

garden-type structures such as trellises and gazebos; structures below the shoreline; fences and walls; and rockeries. MMC 17.12.010(B). The playhouse does not fall within any of these exceptions. The fact that it has no foundation and sits on sand, which is a pervious surface, is irrelevant, because the playhouse roof covers the ground and prevents the runoff absorption a pervious surface would permit. Nor is the playhouse a garden type structure such as a gazebo or trellis. It is true that a gazebo has a roof that prevents runoff absorption, but the city is entitled to distinguish among garden structures, and the code exception describes unwalled, open spaces, whereas the playhouse is more similar, for coverage purposes, to a small office or studio building, a garden greenhouse or shed, or a detached garage, all of which are subject to the limitation.

The trust contends that because the playhouse has no foundation and is floored only by pavers on sand, in contrast to structures specifically listed in the code as examples of buildings included in the coverage measurement, it is temporary and thus exempt. The ordinance provides for no such exception, and plainly applies to the playhouse.

Setback. Likewise, there is no dispute that the playhouse is located within the side yard setback.[2] The Medina Municipal Code prohibits placement of a permanent structure within a certain distance of the property line. MMC 17.24.010(B). The trust argues the playhouse should be exempt because it is not a permanent structure. But the description of the playhouse as impermanent derives entirely from the McCaws' stated intent to remove it when the children tire of it. When this might occur is left to

speculation. An intent to remove a structure at some indefinite future moment does not make the structure temporary; if it did, virtually any structure would be outside the regulation of the code.

The trust offers a number of imaginative analogies in an effort to avoid application of the setback restriction. But the setback regulations apply to "any building or structure," without exception, and the chapter regulating play structures explicitly applies side yard setback restrictions to playhouses.[3] The hearing examiner did not err in concluding the setback regulations apply to the playhouse.

Nonconforming Structure

The trust argues that even if the regulations apply, the playhouse is a permissible nonconforming structure, because the site has historically been a children's play area, and previously held a large climbing toy. This argument misunderstands the purpose and scope of permissible nonconformity.

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[2] The entire playhouse is contained within that setback area, and one side of the playhouse is only five feet, four inches from the property line shared with the Burnsteads. Although there is no dispute as to the playhouse's location within 20 feet of the property line, the trust appears to challenge the hearing examiner's finding that the playhouse is located in the side yard. We view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. Schofield v. Spokane County, 96 Wn. App. 581, 586–87, 980 P.2d 277 (1999). Because it is supported by sufficient evidence, we accept the finding that the playhouse is in the side yard.

[3] MMC 17.24.010(B); MMC 17.49.010 ("Each . . . site within the city is allowed, with an appropriate building permit, to have one small accessory structure, such as a . . . playhouse . . . located, in whole or in part, within the rear yard setback *with a minimum setback of 15 feet*") (emphasis added). See also MMC 17.48.010 ("Separate accessory buildings, not designed primarily for occupancy . . . shall be permitted *subject to the setback* and other limitations applicable . . . .") (emphasis added).

At times, enactment of an ordinance changes zoning regulations and causes existing buildings to be out of compliance with the new regulation. In such cases, newly nonconforming structures may be permitted to remain and be used for a time after a code change. The city allows continued use and maintenance of nonconforming structures, but requires that any renovation or maintenance work must bring the structure into compliance with current regulations.[4]

There is no evidence the climbing toy had a roof, and it therefore was not a nonconforming structure. Further, the climbing toy was removed and replaced by the playhouse, which enlarged any previous nonconformity. The playhouse is not a legal nonconforming structure. The old climbing toy does not make the new playhouse a structure exempt from code limits.

The hearing examiner did not err in finding that the playhouse violated the setback and coverage regulations.

Variance

The trust contends in the alternative that if the playhouse is subject to city regulation, variances from the coverage and setback ordinances were improperly denied. Again, we disagree.

A variance may be granted only where the hearing examiner finds the existence of each of seven conditions enumerated in MMC 2.78.065(A).[5] Lewis v. City of Medina, 87

[4] "A nonconforming structure may be maintained, repaired, altered, improved, remodeled, expanded, enlarged or reconstructed if the nonconforming condition is eliminated as part of the work to be performed." MMC 17.60.030(B).

[5] MMC 2.78.065(A) provides in relevant part:

Wn.2d 19, 22, 548 P.2d 1093 (1976). Therefore, if a single criterion is unmet, denial of the variance is mandatory. Here, the examiner found that four conditions were not met.[6] The record supports these findings.

Criteria 1 and 5: Extraordinary Circumstances and Material Hardship.

> The hearing examiner shall not vary any of the rules, regulations, or provisions of the zoning ordinances unless it finds, after public hearing, that *all* of the following conditions exist in each case of an application for variance:
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> 1. Exceptional or extraordinary circumstances apply to the property itself . . . which do not apply generally to all other properties in the same zone or vicinity. Qualifying circumstances shall not be the result of the actions of the applicant . . . .
>
> 2. The variance is necessary for the preservation of a property right of the applicant substantially the same as is possessed by owners of other property in the same zone or vicinity.
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> 3. The granting of the variance will not be detrimental to the public welfare or injurious to the property or improvements in the vicinity . . . .
>
> 4. The granting of a variance will not constitute a grant of special privilege inconsistent with the limitations on other properties in the same zoning district.
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> 5. The variance is necessary to relieve a material hardship, which cannot be relieved by any other means. The material hardship must relate to the land itself and not to problems personal to the applicant.
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> 6. The variance permitted is the minimum variance necessary.
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> 7. The variance is compatible with and meets the spirit of the comprehensive plan.

(Emphasis added).

[6] The hearing examiner found criteria 1, 2, 3 and 5 not satisfied as to the structural coverage variance, and criteria 1, 2, and 5 not satisfied as to the setback variance.

Extraordinary circumstances such as the unique shape, location, or topography of the property may serve as the basis for a variance. Martel v. Vancouver (Washington) Bd. of Adjustment, 35 Wn. App. 250, 256, 666 P.2d 916 (1983). The trust argues that because of the slope of the property, structures such as the pool, terrace, and tennis court are included in the coverage calculation which otherwise would not be, in which case the playhouse would not violate the coverage limits. But the trust cannot show that the slope is unique to the trust property as compared to other waterfront lots in the R-20 zoning district.

The trust also alleges that moving the playhouse could jeopardize the children's safety. But personal circumstances, such as age, health, or convenient care of family members do not justify a variance. MMC 2.78.065(A)(5) ("material hardship must relate to the land itself and not to problems personal to the applicant"); see also Martel, 35 Wn. App. at 256 (landowner's inability to maintain the property due to poor health not a basis for variance, but variance justified because lot's unique shape and location would be difficult for anyone to maintain regardless of health); St. Clair v. Skagit County, 43 Wn. App. 122, 127, 715 P.2d 165 (1986) (need to house ailing elderly relative inappropriate basis for variance to build mobile home).

Nor is locating an adequate alternative site for a playhouse a material hardship related to the property itself. The examiner's conclusion that a variance is not necessary "to remove a material hardship relating to the property itself" was supported by the evidence.[7] Clerk's Papers at 19.

[7] The trust also argues that because of the long shoreline boundary (to which a 30 foot setback applies) and the home's orientation (facing the water, such that the "rear" yard where playhouses are permitted is actually on the street), the playhouse cannot be

Further, the extraordinary circumstances justifying a variance may not be of the applicant's own creation. MMC 2.78.065(A)(1) ("Qualifying circumstances [for a variance] shall not be the result of the actions of the applicant . . . ."); see also Lewis, 87 Wn.2d at 23–24 (applicants who conveyed portion of parcel, leaving remainder below minimum lot requirement, denied variance to build on undersize parcel). It is true that regulatory amendments have caused the existing structures to be nonconforming as to the percentage of structural coverage. But it is the new playhouse for which the variances are needed. The hearing examiner's conclusion that the asserted circumstances are self-imposed was not clearly erroneous.

Criterion 2: Property Rights Relative to Rights of Other Owners in Vicinity. There was also no error in the examiner's finding that the variance was not "necessary to preserve property rights similar to other owners in the vicinity." As the examiner concluded, the trust "enjoys substantially the same property rights as are possessed by owners of other property in this same zoning district," that is, the right to develop and use the property "as a residence with amenities consistent with other properties in the vicinity." Clerk's Papers at 18. There is no showing that others in the vicinity have enjoyed greater property rights.

Criterion 3: Public Welfare. Finally, the playhouse's proximity to the Burnsteads' boundary line makes the playhouse visible and the children's play audible to the

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moved from its current location in the boundary setback. Medina is a peninsula, and numerous other landowners have waterfront and are subject to the 30 foot setback from the lake. See MMC ch. 17.38, Figure 1. The waterfront does not create a unique circumstance.

neighbors. Though the sound of children's play is perhaps not within the typical understanding of "public detriment," the record supports the examiner's finding that the noise and view impact would be detrimental to the public welfare or injurious to properties in the near vicinity. In any event, whether or not this finding is affirmed, the other criteria are not met.

We affirm denial of the variance.

Constitutional Claims

Contrary to the trust's assertions, the Constitution does not confer a right to erect a 128-square-foot playhouse that violates applicable local zoning regulations. Zoning is a "constitutionally permissible exercise of the police power." Lewis, 87 Wn.2d at 21. Legislative enactments are presumed constitutional, and the party challenging the enactment bears the burden of proof of unconstitutionality. Girton v. City of Seattle, 97 Wn. App. 360, 363, 983 P.2d 1135 (1999). Constitutional questions are reviewed de novo. City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

The trust asserts infringement of its procedural and substantive due process rights. We are unpersuaded by either claim.

Substantive Due Process. To determine whether a regulation violates substantive due process, we must answer three questions: whether the regulation (1) is aimed at achieving a legitimate public purpose, (2) uses means that are reasonably

necessary to achieve that purpose, and (3) is not unduly oppressive on the landowner. Girton, 97 Wn. App. at 363 (quoting Presbytery of Seattle v. King County, 114 Wn.2d 320, 330, 787 P.2d 907 (1990)). "If the court can reasonably conceive of a state of facts which would warrant the legislation, those facts will be presumed to exist," and the court will presume the legislation was based on those facts. Duckworth v. City of Bonney Lake, 91 Wn.2d 19, 27, 586 P.2d 860 (1978).

The trust does not deny that the structural coverage regulation has a legitimate public purpose, but contends the regulation is unduly oppressive, and is not "reasonable" because it prohibits the playhouse while allowing a much larger gazebo. But regulations need not be "precisely tailored" to serve the government interest in every individual case, and "when regulations 'tend to solve' the problem being addressed," government is using means reasonably necessary to its purpose. Girton, 97 Wn. App. at 365–66 (quoting Presbytery, 114 Wn.2d at 330); State ex rel. Miller v. Cain, 40 Wn.2d 216, 223, 242 P.2d 505 (1952). The numerous legitimate purposes of structural coverage limits include ensuring green space, minimizing storm water runoff, and enabling groundwater absorption. The fact that the regulation exempts gazebos and in-ground pools does not demonstrate that applying the limit to a playhouse is unreasonable. Trellises and gazebos have no walls, and so impose significantly less bulk and less impact on views and green space. Such distinctions are not unreasonable.

Nor does the regulation unduly oppress the trust or the residents.[8] A landowner's property right is to "utilize his own land as he sees fit," subject to

regulations that are a reasonable exercise of the police power. Norco Construction, Inc. v. King County, 97 Wn.2d 680, 684, 649 P.2d 103. The city's regulations merely prevent the trust from retaining the playhouse in addition to the other 22,662 square feet of improvements on the property.

References to the right to raise children free of government interference are not germane. It is the use of the property that is governed by the regulations, not the raising of children. Moreover, a freestanding playhouse cannot be called "necessary" for a child's care. See People v. Pierson, 176 N.Y. 201, 211, 68 N.E. 243 (1903).

Nor does the regulation violate principles of equal protection. The regulation is the same for all neighboring R-20 zoned lots. Contrary to the trust's argument, the fact that its parcel is nearly four times larger than average does not enter into the equation. Allowable structural coverage is a percentage of total lot area, not a finite amount regardless of lot size.

Procedural Due Process. The trust contends that because it had no notice that the city's code required a building permit for the playhouse, its due process rights were infringed. The notice required for due process is the enactment of the regulation itself, there in the public record for anyone to read. Holbrook, Inc. v. Clark County, 112 Wn. App. 354, 365, 49 P.3d 142 (2002) ("When the [constitutional] challenge is to a legislative enactment, the legislative process provides all the process that is due.").

We reject the trust's arguments and affirm denial of the variance.

[8] Because we conclude the constitutional challenges fail on other grounds, we need not determine whether the trust has adequate standing to raise the claims, since it is the residents, not the trust itself, who are injured by the regulations' impact.

Attorney Fees

Both the city and the Burnsteads request an award of attorney fees. The statute provides:

> [R]easonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision.

RCW 4.84.370. The city's variance denials and mooting of the building permit application are within the statutory scope, as a "decision . . . by a city . . . to . . . condition a . . . permit involving a . . . variance." Id. Unlike Thurston County v. Cooper Point Association, 148 Wn.2d 1, 15, 57 P.3d 1156 (2002) cited by the trust, this litigation did involve a development permit: the building permit sought by the trust, ultimately mooted because issuance depended upon variances which were denied. Because the city prevailed at every level of appeal, it satisfies the statutory requirements and is entitled to fees.

The statute also entitles the Burnsteads to fees. The statute does not limit recovery of fees to local governments. Gig Harbor Marina, Inc. v. City of Gig Harbor, 94 Wn. App. 789, 797–98, 973 P.2d 1081 (1999). The Burnsteads have been involved in the adjudication of this matter from the beginning, because their complaint first brought the city's attention to the playhouse. Their position has prevailed at every level of litigation, and they too are entitled to fees on appeal. Baker v. Tri-Mountain Resources, Inc., 94 Wn. App. 849, 854, 973 P.2d 1078 (1998).

CONCLUSION

We affirm. Fees and costs are granted to the City of Medina and the Burnsteads pursuant to RAP 18.1.

Ellington, J.

WE CONCUR:

Cox, J.

Baker, J.